

1
2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 ROBERT GORDON JOHNSTONE,

Case No. 3:18-cv-00533-MMD-CBC

7 Petitioner,

8 v.

ORDER

9 STATE OF NEVADA, *et al.*,

10 Respondents.
11

12 **I. DISCUSSION**

13 On November 8, 2018, this Court denied Petitioner's motion to proceed *in forma*
14 *pauperis* and directed him to pay the filing fee in order to proceed with his petition for writ
15 of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 3.) He has complied with that
16 order and paid the required fee. (ECF No. 4.)

17 With his petition, Petitioner seeks to set aside Nevada convictions on two counts
18 of first-degree murder entered in 1976. The Court notes that petitioner has brought
19 previous actions under 28 U.S.C. § 2254, at least one of which (CV-N-94-370-ECR)
20 culminated in a denial on the merits. In that proceeding, the Ninth Circuit Court of Appeals
21 affirmed this Court's final order dismissing the petition. *See Johnstone v. Dir., Nevada*
22 *Dep't of Prison*, Case No. 98-16476, 1999 WL 639195 (9th Cir. Aug. 19, 1999). The
23 United States Supreme Court subsequently denied petitioner's petition for writ of
24 certiorari. *See Johnstone v. Bayer*, 529 U.S. 1058 (2000).

25 If a petitioner has previously filed an application for habeas relief under section
26 2254 which has been denied on the merits, the court cannot grant relief with respect to a
27
28

1 claim that was presented in the prior application. 28 U.S.C. § 2244(b)(1). In addition, the
2 court cannot grant relief with respect to a claim that was not presented in the prior
3 application unless:

4 (A) the applicant shows that the claim relies on a new rule of
5 constitutional law, made retroactive to cases on collateral review by the
Supreme Court, that was previously unavailable; or

6 (B)(i) the factual predicate for the claim could not have been
7 discovered previously through the exercise of due diligence; and

8 (ii) the facts underlying the claim, if proven and viewed in light of the
9 evidence as a whole, would be sufficient to establish by clear and
convincing evidence that, but for constitutional error, no reasonable
factfinder would have found the applicant guilty of the underlying offense.

10 28 U.S.C. § 2244(b)(2). Moreover, § 2244(b)(3) requires a petitioner to obtain leave from
11 the appropriate court of appeals before filing a second or successive petition in the district
12 court.

13 Petitioner has failed to secure an order from the court of appeals authorizing this
14 action as required by § 2244(b)(3). Therefore, this Court is without jurisdiction to consider
15 the habeas petition filed herein. *See Burton v. Stewart*, 549 U.S. 147, 153 (2007).

16 II. CERTIFICATE OF APPEALABILITY

17 If petitioner seeks to appeal this decision, he must first obtain a certificate of
18 appealability. *See* 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the
19 court of appeals from a final order in a habeas corpus proceeding unless a circuit justice
20 or judge issues a certificate of appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir.
21 2005) (per curiam) (holding that a certificate of appealability is required when the district
22 court dismisses a motion on the ground that it is an unauthorized, successive collateral
23 attack). A certificate of appealability may issue only if the petitioner “has made a
24 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In
25 addition, when a § 2254 petition is denied on procedural grounds, a certificate of
26 appealability should issue only when the petitioner shows that reasonable jurists “would
27
28

1 find it debatable whether the district court was correct in its procedural ruling.” *Slack v.*
2 *McDaniel*, 529 U.S. 473, 484 (2000).

3 Petitioner has not made a substantial showing that a reasonable jurist would find
4 it debatable whether this Court is correct in dismissing his petition on procedural grounds.
5 Therefore, the Court denies a certificate of appealability.


6 **III. CONCLUSION**

7 It is therefore ordered that the Clerk shall file the petition for writ of habeas corpus
8 (currently docketed as ECF No. 1-1). The petition is dismissed for lack of jurisdiction. The
9 Clerk shall enter judgment accordingly.

10 It is further ordered that the Clerk shall also file Petitioner’s motion for appointment
11 of counsel (currently docketed as ECF No. 1-2). The motion is denied as moot.

12 It is further ordered that a certificate of appealability is denied.

13
14 DATED THIS 27th day of November 2018.

15 
16 _____
17 MIRANDA M. DU
18 UNITED STATES DISTRICT JUDGE
19
20
21
22
23
24
25
26
27
28